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No.

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal agency, when disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, may take account of prior disciplinary actions that are the subject of pending grievance proceedings.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Postal Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 212 F.3d 1296. The opinion of the Merit Systems Protection Board (App., *infra*, 9a-12a) is unpublished, but the decision is noted at 84 M.S.P.R. 619 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2000. A petition for rehearing was denied on July 13, 2000 (App., *infra*, 44a). On October 2, 2000, the Chief Justice extended the time for filing a petition for

a writ of certiorari to and including November 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), are reproduced at App., *infra*, 45a-58a.

STATEMENT

1. Respondent worked for the United States Postal Service (Postal Service) as a Letter Technician in Hinesville, Georgia. App., *infra*, 1a. The Postal Service disciplined respondent on three separate occasions between May 1997 and August 1997. On May 13, 1997, respondent received a letter of warning for insubordination after she left work for a doctor's appointment without first putting her day's mail in order. *Id.* at 2a, 36a. Less than a month later, on June 7, 1997, respondent received a seven-day suspension for delaying the mail and failing to follow instructions. *Id.* at 2a. Two months later, on August 7, 1997, respondent received a 14-day suspension for delaying the mail, claiming unauthorized overtime, failing to follow instructions, and performing her duties in an unsatisfactory manner. *Ibid.* The union representing respondent filed grievances challenging each of those three disciplinary actions.

On September 13, 1997, respondent requested 3.5 hours of overtime (or assistance from another letter carrier) to prepare and deliver the mail on her route. App., *infra*, 14a. That request "seemed like a gross overestimate" to respondent's supervisor. *Id.* at 17a. The supervisor later testified that respondent had "a low volume of mail" on the day in question; that he could not recall another request for so much overtime

during a non-holiday period; and that any request for more than two hours of overtime "sends up a red flag." *Ibid.* After respondent reaffirmed her estimate of 3.5 hours overtime, the supervisor reassigned some of respondent's mail to other letter carriers and accompanied respondent on her route. *Id.* at 17a-18a. The supervisor observed no unusual conditions on the route. Respondent also did not appear to suffer from any physical impairment. *Id.* at 18a-19a. Based upon his observations and the amount of time taken by respondent and the other letter carriers, the supervisor charged respondent with overestimating her time by 1.5 hours. *Id.* at 15a, 29a. Letter carriers are responsible for correctly estimating the amount of time they will need to complete their work on a given day, within a margin of error of 15 to 20 minutes. *Id.* at 16a.

The supervisor proposed that respondent be removed from service and a personnel officer upheld that removal. App., *infra*, 2a. The Postal Service dismissed respondent effective November 26, 1997. *Id.* at 13a.

2. After two days of hearings, an administrative judge of the Merit Systems Protection Board (MSPB) affirmed respondent's dismissal. App., *infra*, 13a-43a. The administrative judge upheld the Postal Service's finding that respondent had failed to perform her duties in a satisfactory manner (*id.* at 14a-30a), and rejected respondent's affirmative defenses of discrimination. *Id.* at 30a-35a.

The administrative judge also upheld the penalty of removal from service. App., *infra*, 36a. In deciding to remove respondent, the Postal Service relied upon the nature of the charge, "the fact that there was no room for [respondent's overestimate] to have been a mistake," and respondent's history of similar offenses. *Ibid.* The administrative judge noted that because prior

disciplinary actions against respondent were in writing, had been made a part of the record, and respondent had an opportunity to grieve them, review of those earlier actions was limited under MSPB precedent to determining whether the earlier actions were clearly erroneous. *Id.* at 37a (citing *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658, 659-661 (1981)). Respondent had not argued in the removal proceeding that the Postal Service's earlier disciplinary actions were improper. Nevertheless, the administrative judge reviewed the earlier actions on which the Postal Service relied and found that they were not clearly erroneous. *Ibid.* The administrative judge further found that respondent's removal, although seemingly harsh "[a]t first blush" (*ibid.*), was "within the bounds of reasonableness" (*id.* at 39a) given respondent's "pattern of [mis]conduct" (*id.* at 38a); respondent's calculated submission of an inflated overtime request to earn undeserved pay or lessen her workload (*ibid.*); and respondent's own testimony indicating that she "has little potential for rehabilitation" (*id.* at 39a).

3. Respondent petitioned the MSPB for review of the administrative judge's decision. In July 1999, while respondent's petition for review was pending, an arbitrator ruled in favor of respondent with respect to the first disciplinary action taken against her—the May 1997 letter of warning for insubordination—and ordered it expunged from respondent's disciplinary record. App., *infra*, 5a. The MSPB was not advised of the arbitrator's decision, however. It denied respondent's petition for review, in part on the ground that respondent had not provided any "new, previously unavailable, evidence." *Id.* at 9a-10a.

4. The United States Court of Appeals for the Federal Circuit, exercising jurisdiction pursuant to

5 U.S.C. 7703 and 28 U.S.C. 1295(a)(9), affirmed in part, vacated in part, and remanded for further proceedings. App., *infra*, 1a-8a. Deciding the case without argument, the court of appeals affirmed the MSPB's determination that respondent failed to perform her duties in a satisfactory manner. The court of appeals also affirmed the MSPB's rejection of respondent's discrimination claims. *Id.* at 4a-5a. But the court of appeals reversed the MSPB's approval of the removal penalty. The court took judicial notice that the arbitrator had overturned the Postal Service's May 7, 1997, letter of warning to respondent, and that other challenges to respondent's disciplinary record were pending. *Id.* at 5a-6a. In light of these facts, the court of appeals held "that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." *Id.* at 7a. The court reasoned that consideration of earlier disciplinary actions that are subject to a pending challenge "would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Ibid.* The court remanded to the MSPB for a determination whether (1) the case should be sent back to the Postal Service, or (2) the MSPB itself should set a new penalty. *Id.* at 7a-8a.

On July 13, 2000, the court of appeals denied the Postal Service's petition for rehearing.

REASONS FOR GRANTING THE PETITION

The court of appeals has incorrectly decided a question of considerable importance to the federal government and federal employees. The court of appeals' decision finds no support in the civil service laws or in due process. To the contrary, the longstanding admin-

istrative procedures overturned by the court of appeals fully protect the statutory and constitutional rights of federal employees and the reliability of agency determinations.

The court of appeals' decision fails to give appropriate deference to the MSPB's statutory responsibility for reconciling the twin goals of efficiency in the civil service and fairness to federal employees. See generally *United States* v. *Fausto*, 484 U.S. 439, 444-447 (1988). If it is allowed to stand, the court of appeals' decision will result in a less efficient civil service and greater administrative costs, without any substantial increase in fairness to employees. The court of appeals recognized that the employee's disciplinary history is "an important factor when considering whether a particular penalty [for misconduct] is reasonable." App., *infra*, 6a. Yet, overturning decades of consistent administrative practice, the court of appeals precluded federal employers and the MSPB from considering highly relevant disciplinary histories in many cases. The court of appeals' new rule creates a strong incentive for employees who are subject to discipline to file grievances and prolong grievance proceedings, solely to protect against possible future discipline. At the same time, the new rule may discourage federal agencies from retaining and seeking to rehabilitate employees who are subject to dismissal, because it may be impossible to discharge a recidivist employee if efforts at rehabilitation fail. As a result of the Federal Circuit's exclusive jurisdiction over appeals from decisions of the MSPB (see 5 U.S.C. 7703), the issue in this case is unlikely to be presented to any other court of appeals. Indeed, the issue is unlikely to arise again in the Federal Circuit, because the MSPB will apply the ruling of the court of appeals, and the government (unlike its

employees) does not have an automatic right of appeal from adverse MSPB decisions. 5 U.S.C. 7703(a)(1); 5 U.S.C. 7703(d) (1994 & Supp. IV 1998).

Because the court of appeals' decision threatens to do substantial damage to the civil service and represents an unjustifiable judicial intrusion into federal employee discipline, further review is warranted.[1]

1. The Civil Service Reform Act of 1978 (Reform Act), Pub. L. 95-454, 92 Stat. 1111, comprehensively revised the statutory rights and obligations of federal civil servants. *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. at 91. Among Congress's purposes in enacting that reform was "preserv[ing] the ability of federal managers to maintain 'an effective and efficient Government,'" a goal that Congress pursued through new provisions covering removal and discipline of employees for unacceptable performance or misconduct. *Cornelius* v. *Nutt*, 472 U.S. at 650-651 (quoting 5 U.S.C. 7101(b)). In particular, Congress wanted "to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable." *Id.* at 662-663 (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 51 (1978)).

To achieve Congress's goals, the Reform Act provides agencies primary discretion to take disciplinary action that will most effectively address an employee's

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[1] This Court has often recognized that a possible misapplication of the federal civil service laws by the court of appeals is sufficiently important to warrant review. See, *e.g.*, *LaChance* v. *Erickson*, 522 U.S. 262 (1998); *Carlucci* v. *Doe*, 488 U.S. 93 (1988); *Fausto*, *supra*; *Department of Navy* v. *Egan*, 484 U.S. 518 (1988); *Cornelius* v. *Nutt*, 472 U.S. 648 (1985); see also *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983).

misconduct. Sections 7512 and 7513 of Title 5 provide that an agency may take adverse action against a covered employee—including removal, suspension of more than 14 days, demotion, or a furlough—"for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a).[2] The employee, however, is entitled to four specific procedural protections: (1) advance written notice of the proposed employment action; (2) a reasonable time to respond; (3) counsel or another chosen representative; and (4) a written decision providing specific reasons for the agency's action. 5 U.S.C. 7513(b) and (c). "Thus, on the one hand, the Reform Act strives to enable government managers to more effectively hire, fire, and otherwise discipline their employees, while at the same time according employees their requisite procedural protections." *LaChance* v. *Devall*, 178 F.3d 1246, 1254 (Fed. Cir. 1999).

An employee who receives a suspension of more than 14 days, or another serious sanction such as removal, may appeal the agency's decision to the MSPB.[3] 5 U.S.C. 7513(d). The MSPB must sustain the agency's decision if the decision is supported by a preponderance of the evidence and the employee does not show that the decision was infected by "harmful error in the application of the agency's procedures," a specifically prohibited employment practice such as discrimination, or

[2] Respondent qualifies as a covered employee under 5 U.S.C. 7511(a)(1)(B)(ii) and (b)(8). Pertinent provisions of the Reform Act also apply to respondent pursuant to 39 U.S.C. 1005(a)(1) and (2).

[3] Section 7503 of Title 5 establishes procedures for suspensions of 14 days or less. Section 7503 affords employees accused of less serious offenses fundamentally the same procedural protections guaranteed by Section 7513: notice, an opportunity to respond, representation, and a written decision. The employee, however, does not have a right of appeal.

another violation of law. 5 U.S.C. 7701(c). The MSPB may alter the agency's designated penalty if the penalty exceeds the bounds of reasonableness. *Devall*, *supra*; *Douglas* v. *Veterans Admin.*, 5 M.S.P.B. 313, 314-324 (1981).

An employee aggrieved by the MSPB's decision may appeal to the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over such appeals. 5 U.S.C. 7703; 28 U.S.C. 1295(a)(9). The court of appeals will reverse MSPB decisions that are: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c). The court of appeals has recognized, however, that fixing the appropriate penalty for employee misconduct "is a matter committed primarily and largely to the discretion of the agency." *Hagmeyer* v. *Department of Treasury*, 757 F.2d 1281, 1284 (Fed. Cir. 1985). Accordingly, the court of appeals "will normally defer to the judgment of the agency as to the appropriate penalty for employee misconduct unless the severity appears totally unwarranted." *Id.* at 1284-1285.

2. The new rule announced by the court of appeals in this case—that "consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits" (App., *infra*, 7a) —contradicts two decades of consistent administrative practice that faithfully implemented the Reform Act's procedures for employee discipline.

The MSPB's decision in *Douglas*, *supra*, issued in 1981, established standards to guide the agencies' exercise of their broad discretion to select appropriate discipline. Drawing upon judicial and administrative

precedent, the MSPB identified a non-exhaustive list of twelve factors that are "generally recognized as relevant" to the penalty determination. 5 M.S.P.B. at 331. Among those factors are the employee's disciplinary record and potential for rehabilitation. *Id.* at 332. When setting a disciplinary penalty, the agency must "consider the relevant factors and * * * strike a responsible balance within tolerable limits of reasonableness." *Id.* at 332-333.

Later in 1981, the MSPB addressed the question presented by this case: Under what circumstances may prior disciplinary action be reopened or disregarded in the course of later disciplinary proceedings? See *Bolling* v. *Department of Air Force*, 8 M.S.P.B. 658 (1981). To answer that question, the MSPB looked to regulations that formerly had governed the Civil Service Commission.[4] Adopting the pre-existing administrative rule, the MSPB held that when it reviews a disciplinary action that is premised upon the employee's disciplinary record, the disciplinary record is itself a proper subject of review.[5] *Id.* at 658-659.

The level of review depends upon the procedural protections afforded the employee in the earlier disciplinary action that the employee collaterally attacks. Specifically, the MSPB looks for three procedural safeguards in the earlier action: (1) whether the employee was informed of the action in writing; (2) whether the employee was given an opportunity to dispute the action before a higher authority; and (3) whether the action is a matter of record. 8 M.S.P.B. at 659, 660-661. If one or more of those protections is absent, then the MSPB undertakes "a full, de novo review" of the earlier action as part of its review of the later disciplinary decision. *Id.* at 659. But, if all three safeguards are present, then the MSPB will overturn the prior action only if the employee can show, based upon the existing record gathered in the earlier proceeding, that the earlier action was clearly erroneous. *Id.* at 660-661. The MSPB determined that its approach

> strikes a reasonable and workable balance between the competing interests involved * * *. On the one hand, an appellant is not allowed to relitigate issues that either were, or could have been thoroughly litigated previously. On the other hand, agencies are not able to utilize clearly erroneous prior actions as aggravating factors so as to enhance the penalties imposed.

Id. at 660. The MSPB has consistently applied the rules of decision set out in *Bolling*. *E.g.*, *Crawford* v. *Department of Justice*, 45 M.S.P.R. 234, 236 n.1 (1990) (citing cases); *Holland* v. *Department of Defense*, 83 M.S.P.R. 317, 320-322 (1999).

Pursuant to *Bolling*, the MSPB reviews disciplinary actions in the employee's record for clear error even when, as here, these actions are the subject of a pending arbitral grievance. An earlier agency action that has not been overturned and was procedurally regular

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[4] "The [MSPB] was created to assume the adjudicatory functions of the old [Civil Service] Commission and, with certain exceptions, those functions passed unchanged from the Commission to the [MSPB]." *Department of Navy* v. *Egan*, 484 U.S. at 531 n.6. Among those functions inherited by the MSPB was review of agency-imposed discipline. In *Douglas*, the MSPB held that it has the same authority to review disciplinary penalties as the Civil Service Commission possessed. 5 M.S.P.B. at 314-324.

[5] The Court of Claims recognized and applied that administrative policy. *Bredehorst* v. *United States*, 677 F.2d 87, 90 (Ct. Cl. 1982); *Swentek* v. *United States*, 658 F.2d 791, 794-796 (Ct. Cl. 1981); *Webb* v. *United States*, 227 Ct. Cl. 777 (1981).

enjoys "the presumption of honesty and integrity which accompanies administrative adjudicators;"[6] the action is given effect, notwithstanding the pending grievance, unless it is clearly erroneous or subject to de novo review. *Hubbard* v. *United States Postal Serv.*, 32 M.S.P.R. 505, 508 (1987).[7]

The employee, however, may introduce evidence that the earlier disciplinary action has been overturned as a result of the employee's grievance. In that situation, the reversal overcomes the presumption that the earlier disciplinary action is valid, and precludes reliance upon it. *Jones* v. *Department of Air Force*, 24 M.S.P.R. 429, 431 (1984).

3. The longstanding *Bolling* approach, as applied by the MSPB in this case, is entirely consistent with the protections afforded federal employees under the Reform Act, and reasonably accommodates the competing interests of government efficiency and employee due process. The Reform Act's notice and hearing requirements establish an "elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—

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[6] See generally *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 101 (1949) ("An administrative order is presumptively valid."); *Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1306 (Rehnquist, Circuit Justice 1976) (noting "the time-honored presumption in favor of the validity of" agency determinations).

[7] See also *Morgan* v. *Department of Defense*, 63 M.S.P.R. 58, 61 (1994) ("the pending grievance is considered a challenge to the action," which the MSPB reviews under *Bolling*); *Freeman* v. *Department of Transp.*, 20 M.S.P.R. 290, 292 (1984) (subject to *Bolling* review, "an agency may rely on a record of past discipline even where a prior disciplinary action is the subject of a pending grievance"); *Carr* v. *Department of Air Force*, 9 M.S.P.B. 714, 715 (1982) (same).

administrative and judicial—by which improper action may be redressed." *Bush* v. *Lucas*, 462 U.S. at 385. And the *Bolling* rule ensures that employees are not denied the "carefully delineated rights" to notice and a hearing that Congress afforded through this scheme. *LaChance* v. *Erickson*, 522 U.S. at 266.

As discussed above, the Reform Act entitles employees facing adverse action to written notice of the proposed action, an opportunity to respond, and a written decision giving reasons for the action. 5 U.S.C. 7503, 7513; cf. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985) (discussing due process requirements applicable to termination of public employee). *Bolling* protects those rights. If, in a prior disciplinary action, the employee was not afforded written notice, an opportunity for review by a different authority, or a record decision, then the presumption of validity does not apply to the prior action and the employee is entitled to de novo review. The MSPB applies a presumption of validity to the employee's disciplinary record only after it determines that the employee received those three procedural protections. Even then, the MSPB reviews the relevant administrative record for clear error. *Bolling*, 8 M.S.P.B. at 659-661; see also *Hubbard*, 32 M.S.P.R. at 508-509. Accordingly, any material aspect of the employee's disciplinary record that has not been developed in accordance with the key procedural protections, is subject to de novo review by the Board.

There will be cases, such as this one, in which a procedurally regular agency determination that forms part of the employee's disciplinary record, and is relied upon by the agency, is later reversed. But the MSPB has accommodated those cases as well. If the employee

takes an appeal to the MSPB, and the prior action is reversed before the MSPB renders its decision, then the MSPB will strike the prior action from the employee's disciplinary record and overturn any reliance upon it. *Jones*, 24 M.S.P.R. at 431. Thus, respondent could have brought the arbitrator's July 1999 decision overturning the Postal Service's May 1997 letter of warning to the attention of the MSPB in connection with her petition for review of the administrative judge's decision. The arbitrator's decision would have qualified as new, previously unavailable evidence, which would have supported granting her petition. 5 C.F.R. 1201.115(d)(1) (MSPB may grant a petition for review when "[n]ew and material evidence is available that, despite due diligence, was not available when the record closed").

The MSPB also has discretion to reopen its decision in the event that the employee's disciplinary record is revised materially *after* the MSPB affirms the challenged disciplinary action. 5 C.F.R. 1201.118 ("The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part."). The MSPB's discretionary power to reopen provides the employee fair opportunity to have the agency's sanction re-evaluated when a relevant grievance is not timely resolved. Cf. *Payne* v. *United States Postal Serv.*, 69 M.S.P.R. 503, 505-508 (1996) (reopening "in the interests of justice" where employee's criminal conviction was reversed after MSPB upheld employee's removal in light of the conviction).

4. The rule adopted by the court of appeals, if permitted to stand, would do serious harm to the civil service system, which includes more than two million federal employees. The rule significantly limits the

ability of federal agencies to issue appropriate discipline. In all likelihood, the rule announced by the court of appeals works to the detriment of most affected employees as well.

a. The rule announced by the court of appeals seriously impairs federal agencies' authority and discretion to calibrate disciplinary action to the circumstances presented by the employee's record, and thereby undermines the statutory goal of "promot[ing] the efficiency of the service." 5 U.S.C. 7513(a). Even when removal or a long suspension would be reasonable, a supervisor may deem it best for the efficiency of the service to impose a lesser penalty, such as a short suspension or letter of reprimand. Repetition of the same or related infractions would lead to more severe penalties, including removal if the employee refuses to correct his or her conduct. When supervisors use that approach (known in private-sector labor relations as "progressive discipline"), employees benefit from additional notice of workplace problems and an opportunity to correct deficiencies prior to termination. For its part, the agency has the flexibility to address recidivism if it occurs.

That flexible approach, however, assumes review of the employee's disciplinary history. Indeed, the employee's disciplinary history is one of the factors federal agencies generally *must* consider when setting a penalty. *Douglas*, 5 M.S.P.B. at 332. If pending grievances precluded an agency from taking account of past disciplinary actions for, say, unexcused absences, then the agency could not punish a second, third, or tenth absence more severely than a first absence. The most recent charge, even if part of a pattern of similar misconduct, would have to be considered in a vacuum. The decision of the court of appeals would thus prevent

agencies from sensibly disciplining habitual offenders whose instances of misconduct, considered in isolation, do not warrant a serious penalty.

The problem of excluding recent disciplinary actions from consideration is all the more acute because federal agencies' disciplinary guidelines commonly limit the use of prior disciplinary actions that are stale. For example, Department of Defense Administrative Instruction No. 8 (Aug. 17, 1981), which applies to employees under the Secretary of Defense and the Joint Chiefs of Staff, provides for consideration of past suspensions only if they occurred within the last three years, and of past reprimands and admonishments only if they occurred within the last two years. Grievance proceedings, however, may take years to resolve. By the time a valid disciplinary action is upheld and thus rendered cognizable by the court of appeals, it may be too old to consider. Employees may be able to preclude *any* future consideration of a disciplinary action, simply by filing a grievance.[8] Thus, in practical effect, the court of

[8] In this case, the arbitrator overturned respondent's May 1997 letter of warning more than two years later, in July 1999. App., *infra*, 5a. Respondent's grievances challenging the June 1997 and August 1997 suspensions still are pending after more than three years. Yet, the collective bargaining agreement governing respondent's employment with the Postal Service provided that "[t]he records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years." Agreement Between United States Postal Service and National Association of Letter Carriers, AFL-CIO (1994-1998) art. 16:10. If respondent's misconduct during 1997 could not be considered within two years of its occurrence because of the pending grievances, and could not be considered thereafter under the collective bargaining agreement, then this misconduct might never be eligible for consideration in any disciplinary proceeding.

appeals' decision is at odds with the court's own recognition "that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances." App., *infra*, 6a.

The possibility also exists that federal supervisors, being unable to implement discipline based upon the employee's full record, may impose a more severe (but nevertheless reasonable) penalty for a first offense, rather than imposing a less severe penalty in the hope that the employee's conduct will improve. Such an outcome could increase turnover and discontent among federal employees, also compromising "the efficiency of the service." 5 U.S.C. 7513(a). Indeed, by establishing an apparently unqualified rule that "as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits," App., *infra*, 7a, the court of appeals unnecessarily limited the ability of the MSPB and federal agencies to develop procedures that address the court of appeals' underlying concerns, yet also respect the needs of an efficient civil service system. Cf. *National Fed'n of Fed. Employees, Local 1309* v. *Department of Interior*, 526 U.S. 86, 99-101 (1999) (remanding to give Federal Labor Relations Authority the opportunity to address federal labor issue in light of Court's statutory construction).

b. The decision of the court of appeals immunizes employees from cumulative discipline so long as a grievance is pending. This immunity will encourage employees to challenge all disciplinary actions, even relatively minor ones. It will also give employees an

incentive to prolong grievance proceedings. The decision below thus will increase the administrative burden on federal agencies and undermine processes for the efficient resolution of disputes. The dockets of the MSPB and, ultimately, the Federal Circuit also will be burdened with strategic appeals brought to protect against possible future discipline. The decision below, if allowed to stand, will upset Congress's plan for a system of administrative and judicial review that "balance[s] the legitimate interests of * * * federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. at 445.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 00-3123

MARIA A. GREGORY, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

[Decided: May 15, 2000
Rehearing Denied: July 13, 2000]

Before: MAYER, Chief Judge, CLEVENGER, and GAJARSA, Circuit Judges.

CLEVENGER, *Circuit Judge.*

Maria A. Gregory was fired from her position as a Letter Technician with the United States Postal Service ("Postal Service") in Hinesville, Georgia, because she allegedly overestimated the delivery time of her route by about an hour and a half. The Merit Systems Protection Board ("Board") rejected Ms. Gregory's appeal, holding that the penalty of removal was justified by Ms. Gregory's prior disciplinary record, part of which was the subject of then-current administrative grievance proceedings. *See Gregory* v. *United States Postal Serv.*, No. AT075298261-I-1, slip op. at 19 (Sept. 11, 1999). Because prior disciplinary actions that are subject to ongoing proceedings may not be used to

support the reasonableness of a penalty, we affirm-in-part, vacate-in-part and remand for further proceedings.

I

On September 13, 1997, Ms. Gregory requested 3.5 hours of overtime or assistance in completing her mail route. Her supervisor, questioning whether the overtime was required, nonetheless granted her three hours of assistance. Indeed, Ms. Gregory's supervisor, William J. Cox, provided the assistance and accompanied Ms. Gregory himself. Mr. Cox, keeping precise records of Ms. Gregory's activities that day, alleged that Ms. Gregory overestimated the amount of time or assistance she needed by about 1.3 hours, and undertook disciplinary action on that basis. The Postal Service proposed to remove Ms. Gregory for this offense ("failure to perform duties in a satisfactory manner") based in part upon Ms. Gregory's prior disciplinary record, which (at that time) contained the following: (1) a May 13, 1997, Letter of Warning for insubordination; (2) a June 7, 1997, seven-day suspension for delaying the mail and failure to follow instructions; and (3) an August 7, 1997, fourteen-day suspension for delaying the mail, unauthorized overtime, failure to follow instructions, and failure to perform duties in a satisfactory manner. The proposed removal was upheld by the personnel officer in November 1997.

On appeal to the Board, Ms. Gregory argued that any overestimation should be excused because she was untrained in the practice of estimating route completion times, was unfamiliar with the route she serviced that day, was suffering from carpal tunnel syndrome and bursitis, and had recently had foot surgery. In its

Initial Decision, the Board rejected her arguments, finding Ms. Gregory's factual testimony unpersuasive. *See Gregory*, No. AT0752980261-I-1, slip op. at 11-12. Instead, the Board credited the evidence introduced by the Postal Service, especially the testimony of Mr. Cox. *See id.*, slip op. at 12. Accordingly, the Board sustained the charge. *See id.*, slip op. at 13.

The Board also rejected Ms. Gregory's affirmative defenses. These included: (1) allegations that her removal was in part based upon her disabled status (as we noted above, Ms. Gregory suffered from carpal tunnel syndrome, bursitis, and had recently had foot surgery); (2) claims that her removal was based in part upon race, sex, and age discrimination; and (3) claims that her removal was in retaliation for filing EEO and OSHA complaints and for engaging in union activities. The Board found that Ms. Gregory had not produced sufficient facts to substantiate her claims that the disciplinary action was taken against her for any of these reasons. *See id.*, slip op. at 13-17.

Finally, the Board sustained the removal penalty—finding that the Postal Service had properly applied the factors announced in *Douglas* v. *Veterans Admin.*, 5 MSPB 313, 5 M.S.P.R. 280, 306 (1981). In doing so, the Board's analysis rested heavily upon Ms. Gregory's prior disciplinary record, stating that "it revealed a pattern of conduct by [Gregory] to disregard the agency's and her supervisor's expectations of her performance and conduct." *See Gregory*, No. AT0752980261-I-1, slip op. at 19. Because of this "pattern," the Board ruled that the agency had chosen a penalty within the bounds of reasonableness and affirmed the removal. *See id.*, slip op. at 20.

The initial decision became final on October 20, 1999, *see Gregory* v. *United States Postal Serv.*, 84 M.S.P.R. 619 (1999) (Final Order), precipitating Ms. Gregory's petition to this court. *See* 5 U.S.C. § 7703 (1994). We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) (1994).

II

In this court, Ms. Gregory challenges the factual findings that underlie the Board's holding sustaining the charge against her and rejecting her affirmative defenses. Our review of these factual considerations is extremely limited. *See Rosete* v. *Office of Personnel Mgmt.*, 48 F.3d 514, 516 (Fed. Cir. 1995). We must affirm the Board's decision unless we find it to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) in violation of required procedures; or (3) unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c) (1994).

Here, we cannot say that the Board's factual findings are unsupported by substantial evidence. The Board evaluated the evidence presented by both Ms. Gregory and the Postal Service, finding the latter more credible and persuasive. Such evaluations, when based on the testimony of witnesses, are "virtually unreviewable" by this court. *King* v. *Department of Health & Human Servs.*, 133 F.3d 1450, 1453 (Fed. Cir. 1998). The Board found that Ms. Gregory had indeed overestimated the amount of overtime or assistance she required, and that Ms. Gregory's arguments relating to her lack of qualifications for making such a determination were "without merit," given Ms. Gregory's position and experience with the Postal Service. The Board further found that Ms. Gregory had failed to produce evidence sufficient to

make a prima facie case of discrimination or retaliation in her defense—the Board concluded that no evidence was introduced that indicated that the disciplinary action was not the result of her job performance, and that, in addition, no evidence was introduced that would show that discrimination or retaliation played any role in the evaluation of Ms. Gregory's performance or penalty. We have reviewed the record produced by the Board and find that the Board's factual findings are supported by substantial evidence. Accordingly, we affirm the Board's decision on the charge and its rejection of Ms. Gregory's affirmative defenses.

III

Ms. Gregory also argues that the Board erred when it rested its analysis of the reasonableness of the penalty upon her three prior disciplinary actions, at least some of which were then the subject of grievance proceedings. We agree.

Both the Board and the Postal Service considered, as part of their analysis, three prior disciplinary actions taken against Ms. Gregory: (1) the May 1997 Letter of Warning, (2) the June 1997 seven-day suspension, and (3) the August 1997 fourteen-day suspension. It is undisputed that at least some of these prior actions were the subject of grievance proceedings during the time that this case was pending before the Postal Service and the Board. Indeed, we have taken judicial notice of the fact that one of the actions—the May 1997 Letter of Warning—was overturned by an arbitrator in July 1999 and ordered expunged from Ms. Gregory's personnel record. Our review of the record does not indicate the status of the challenges to the remaining disciplinary actions used to support the removal of Ms.

Gregory, though we note again that the Postal Service does not dispute that duly-raised challenges to these actions were pending during the time that this dispute was being considered by the Postal Service and the Board.

The Board made clear that its determination that the penalty of removal was reasonable under these circumstances was based largely on the prior disciplinary history put forward by the Postal Service. Indeed, the Board noted that "a removal for one instance for failure to perform duties satisfactorily may appear unreasonable." *Gregory*, No. AT0752980261-I-1, slip op. at 19. However, the Board stated that the prior disciplinary history "reveals a pattern of conduct" that made the penalty of removal reasonable. *Id.*

There is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances. *See, e.g., Bryant* v. *National Science Found.*, 105 F.3d 1414, 1417 (Fed. Cir. 1997) (sustaining penalty in part based upon prior disciplinary record); *Webster* v. *Department of the Army*, 911 F.2d 679, 684-85 (Fed. Cir. 1990) (same); *Davis* v. *Veterans Admin.*, 792 F.2d 1111, 1113 (Fed. Cir. 1986) (same); *Douglas* v. *Veterans Admin.*, 5 MSPB 313, 5 M.S.P.R. 280, 306 (1981) (prior disciplinary actions relevant when assessing penalty). But there can also be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed. *See Jones* v. *Department of the Air Force*, 24 M.S.P.R. 429, 431 (1984) ("Since [employee's] earlier ten-day suspension . . . was reversed by grievance, it was effectively canceled and thus should not be considered in determining a reasonable penalty for the current charge."). In this case, Ms. Gregory had challenged, via grievance proceedings, at least part of the prior disciplinary history that was relied upon by the Postal Service and Board in determining the reasonableness of the penalty. At the time of the Board decision, at least, it appears that these challenges were pending. If the grievances were sustained and the prior actions ordered expunged—as, indeed, happened in at least one instance in this very case—the foundation of the Board's Douglas analysis would be compromised. Accordingly, we hold that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits. To conclude otherwise would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action.

Here, as we noted above, the Board (and, it appears, the Postal Service[1]) used Ms. Gregory's prior disciplinary history as a primary factor in determining the reasonableness of the penalty. Because those prior actions that were the subject of ongoing grievance proceedings could not be used, the Board abused its discretion in relying upon them. Accordingly, the Board's determination that the penalty of removal was reasonable must be set aside.

Upon remand, we leave it to the Board to determine whether: (a) the case should be immediately returned to the Postal Service to select a penalty in light of the

[1] Both Ms. Gregory's immediate superior and the personnel officer explicitly noted that Ms. Gregory's prior disciplinary record was a significant basis for their decision to remove her.

precise status of Ms. Gregory's prior disciplinary record; or, (b) the Board should retain jurisdiction for the purpose of exercising its own mitigation authority pursuant to the framework established by *LaChance* v. *Devall*, 178 F.3d 1246, 1259-60 (Fed. Cir. 1999).

IV

The Board's determination regarding the charge against Ms. Gregory—that she failed to perform her duties satisfactorily by overestimating the amount of time that it would take her to complete her mail route—is supported by substantial evidence. The Board's conclusion that the removal penalty was reasonable under the circumstances was an abuse of discretion and is vacated. The case is returned to the Board for further proceedings not inconsistent with this opinion.

COSTS

No costs.

AFFIRMED-IN-PART, VACATED-IN-PART AND REMANDED

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number AT-0752-98-0261-I-1

MARIA A. GREGORY, APPELLANT

v.

UNITED STATES POSTAL SERVICE, AGENCY

[Filed: Oct. 20, 1999]

FINAL ORDER

Before: ERDREICH, Chairman, SLAVET, Vice Chair, MARSHALL, Member

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable,

evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion , sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the Untied States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat* v. *Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, *www.mspb.gov*.

FOR THE BOARD: Signature illegible

Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

Docket No. AT-0752-98-0261-I-1

MARIA A. GREGORY, APPELLANT

v.

UNITED STATES POSTAL SERVICE, AGENCY

[Filed: Sept. 11, 1998]

INITIAL DECISION

Before: YOVINO, Administrative Judge

On December 23, 1997, the appellant filed an appeal of her removal from the position of Letter Technician, PS-6, with the U.S. Postal Service in Hinesville, Georgia, effective November 26, 1997.

The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7511(a)(1)(B), 7512(1), and 7701. The hearing requested by the appellant was held in Savannah, Georgia, on March 31, and April 1, 1998. For the reasons below, the agency's action is AFFIRMED.[1]

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[1] After the close of record, the appellant filed a Supplemental Brief. *See* Appeal File, Tab 24. Because that brief was filed after the close of record and is not a reply brief to the agency's closing argument, I have not considered it.

BURDEN OF PROOF

The agency must prove: (1) its charge by preponderant evidence, 5 U.S.C. § 7701(c)(1)(B); (2) the existence of a nexus between the sustained charge and the efficiency of the service, 5 U.S.C. § 7513(a); and (3) the reasonableness of its penalty, *Douglas* v. *Veterans Administration*, 5 M.S.P.R. 280, 307-308 (1981).

The appellant has the burden of proving, by preponderant evidence, her affirmative defenses of disability, race, sex, and age discrimination and retaliation for filing Equal Employment Opportunity (EEO) complaints, Occupational Safety & Health Administration (OSHA) complaints, and union activity.[2] *See* 5 C.F.R. § 1201.56(a)(2)(iii); Appeal File, Tab 14.

ANALYSIS AND FINDINGS

1. The merits

The appellant was removed based on a charge of failure to perform her duties in a satisfactory manner. *See* Agency Response, Tab 4b. The specification of the charge involves an allegation that the appellant overestimated her need for overtime/auxiliary assistance on September 13, 1997. It is undisputed that the appellant carried the mail on City Route 04 (CR4) on September 10 through 13, 1997. On September 13, 1997, while assigned to case and carry that route, she requested 3.5 hours of overtime/auxiliary assistance. The disputed

[2] The appellant's allegation of harmful procedural error was rejected prior to the hearing for failure to clarify her allegations after the prehearing conference. *See* Appeal File, Tab 16.

factual issue on the merits of the charge concerns whether the appellant overestimated her time by the 1.5 hours with which she was charged.

To understand the factual basis for the agency's charge, it is important to understand the duties of the appellant's position. Five mail delivery routes may be configured in a swing route and the mail for those routes is delivered by five letter carriers and a Letter Technician (T-6), who replaces one of the regular carriers on a different day of the week or when that carrier is absent. This system allows for each of the six employees to have a scheduled day off and still have the five routes covered each day.

Therefore, the T-6's job is more in-depth than that of a regular carrier. *Id.* at 34. He/she must be familiar with five routes and perform the duties of a letter carrier (casing and delivering mail) when the regular carrier is off work. The T-6 has other responsibilities, including training new carriers, reporting observations of problems on the routes, and providing assistance on other routes as needed. As a result, the T-6 is paid a higher salary than the regular letter carrier. The appellant worked as a letter carrier and a T-6 for almost all of the twelve years she worked for the U.S. Postal Service. Transcript (Tr.) at 463.

J. T. Adams, President of Local Branch 53 in Jacksonville, Florida, testified generally about the duties and responsibilities of a letter carrier and T-6, but he testified that he was not familiar with the route at issue in this appeal—CR4. He testified that, when the appellant first arrives at work, there is mail waiting for her to prepare for delivery. The appellant's first responsibility is to separate the mail for delivery at her case,

which was described as similar to a table with a hutch on the back of it. Tr. at 20. That hutch contains horizontal shelves with dividers to allow for the separation of the mail. *Id.* The dividers have address labels (referred to as case labels) on them, and the carrier must use memory recall to determine whether the postal customer has moved or placed his/her mail on hold. *Id.* at 20-21.

Clerks leave mail for the carriers at their case and that mail is generally labeled in trays identifying the route to which the mail goes. *Id.* at 23. The carriers then take a hand full of mail, and, piece by piece, place it in the designated slot. *Id.*

After the mail is cased, the carrier pulls the mail and prepares to go on the street to deliver it. At that point, the carrier withdraws the Delivery Point Sequence (DPS) mail for her route, *i.e.*, mail that has been separated by computer for delivery. She loads the postal vehicle with her cased mail, her DPS mail, and her accountable mail (mail requiring signature or collection of money), proceeds to her route, and delivers the mail. She then returns to the post office.

By 9:30 a.m. each morning, the carrier is required to turn in Postal Form 3996, entitled "Carrier-Auxiliary Control" if he/she believes that he/she will need additional assistance to accomplish mail delivery. By completing that form, the carrier is requesting additional assistance either through the approval of overtime or assistance from other carriers. It is undisputed that the carriers are held to being able to estimate their time within 15-20 minutes of the actual time expended.

On September 13, 1997, the appellant completed a 3996 requesting 3.5 hours of overtime/auxiliary assistance to deliver the mail on CR4. *See* Appeal File, Tab 7, Exhibit 1. In Block J of that form, the appellant was required to write the reason for her use of auxiliary assistance and she wrote: "1/2 K-Marts," "Heavy mail volume," "Heavy accountables," and, "Heavy parcels." *Id.* She also added "new case labels." *Id.*

The appellant's supervisor, William J. Cox, Supervisor of Customer Service in Hinesville, Georgia, testified that, on September 13, 1997, the appellant's cased volume was only 9.25 linear feet (not including DPS mail) and that her estimate of 3.5 hours of overtime/auxiliary assistance seemed like a gross overestimate to him for such a low volume of mail. Tr. at 100. Mr. Cox testified that, whenever anyone put in a request for more than 2 hours, it sends up a red flag. *Id.* He testified that, on September 13, 1997, the mail volume was so light that the carriers only put in two 3996s all day. *Id.* at 102. He also testified that, except around a holiday, he did not recall anyone requesting overtime in the amount of 3.5 hours. Tr. at 140. Thus, based upon his knowledge of her mail volume on that day, he questioned whether she had grossly overestimated her need for assistance.

Mr. Cox testified that she turned in the 3996 before she finished casing her mail. After she finished casing her mail, he observed the mail that she had and questioned her whether delivery of the mail would take the time she estimated. Tr. at 100-101. The appellant responded to him that it was an estimate. *Id.* at 101. He then decided to hand off some of her mail to other carriers and to accompany her when she delivered the remaining portion of her route.

Mr. Cox pulled off that portion of the mail the appellant had that he estimated would take about 3 hours to deliver. That mail was counted by Shawn A. Thompson, Supervisor of Customer Service at Hinesville, Georgia. It was then assigned to three different carriers who did not have 8 hours of work to complete due to low volume: James Poppell, Shannon Aldridge, and "KC."

The appellant and Mr. Cox then went out to the postal vehicle she had previously loaded with her mail and separated out the portion that she was going to deliver. *Id.* at 104. They switched delivery vehicles because they needed a vehicle that had an extra seat on which he could sit. *Id.* at 104-05. It took the appellant 3 hours to deliver her route, which she completed at 3:00 p.m. She drove back to the post office and unloaded her vehicle, which took 22 minutes. Thus, she returned to the post office at 3:22 and was thereafter sent out to assist on another route. *Id.* at 105. She left work at the end of her regular tour of duty, which was at 4:30 p.m.

According to Mr. Cox's testimony, he testified generally that he observed nothing unusual concerning the appellant's delivery of mail on CR4. That route is not a walking route; the carrier pulls up to the boxes and delivers the mail. That route has over 1,000 stops and cluster boxes. Tr. at 202. A cluster box, for example, contains the mail receptacles at an apartment building and services several postal customers. The front of the box is where postal customers retrieve their mail by using their individual keys. The back of the box can be opened by the carrier with one key, giving her access to all boxes at once for the delivery of mail.

Mr. Cox testified that a carrier has to walk approximately 10 to 15 feet to a cluster box. There are two parking loops on CR4, which require the carrier to walk approximately 1/4 mile to deliver the mail for the whole loop. *Id.* at 110.

Mr. Cox testified that he accompanied the appellant each time she walked up to a cluster box to deliver mail. Tr. at 116. He testified that some of the boxes had some mail left from the day before, but that none were too full to the point that she could not easily place mail in the boxes. *Id.* In fact, he testified that he remembered that one box had five small cards in it. *Id.* He testified that she did not pull mail out of cluster boxes to bring it back to the post office. *Id.* at 106.

He testified that he does not recall if she were [*sic*] wearing a brace on her arm, but he does recall that, while she had previously been on light duty, she was not on light duty or restricted duty that week. *Id.* at 106-07. And, she did not indicate or act like she was feeling less than normal concerning her physical health. *Id.* at 107-08. And, he did not observe her having any difficulty walking to and from her postal vehicle on September 13. *Id.* at 118-19.

The appellant had a myriad of explanations as to how she estimated that she would need 3.5 hours of additional assistance. Although she testified that she did not know how to calculate the amount of additional assistance she would need because she was not trained in that regard, she also testified that she not only felt that she had properly estimated her time, but that she may have shorted herself from the time she would have needed to deliver the route. Tr. at 556-57.

In fact, the appellant testified that she considered many, many factors, in her deliberations, which would lead one to conclude that she had a reasoned basis for her estimate. She testified that she considered such factors as: (1) she was unfamiliar with the route; (2) she would have to "clean up" mail she brought back to the post office; (3) she estimated her DPS mail based on the average of 1000 pieces, but she only had 871 pieces on September 13; (4) she received an additional 1.5 feet of mail after she turned in the 3996; (5) having considered that she would pull mail out of customers' boxes regardless of the fact that she was told not to do so by Mr. Cox; (6) her having to prepare and carry mail that was curtailed from the day before; (7) she had approximately 20 linear feet of mail to deliver; (8) having the case labels changed so that it would slow her down while she re-learned where the addresses were located on the case; (9) her impaired ability to walk because of her foot surgery and to case and carry mail because of her carpel tunnel syndrome and bursitis; (10) the effects of having to deliver mail during the day and of the sunlight hitting the pavement and after dark and the presence of nightfall impairing her ability to see; (11) auxiliary assistance does not have to service the route because they deliver the mail regardless of whether the postal customer has moved or has mail on hold; and (12) she thought she would be leaving to deliver the mail 45 minutes to 1 hour later than she actually left because Mr. Cox told her not to pull the mail for the hold mail at the post office, but to do it on the street.

I found the appellant's explanation that she was not trained in the art of estimating to be without merit. First, clearly, even at the hearing, she believed that she had properly estimated, if not shorted herself with, the

time she would need to deliver the mail she had on September 13, 1997. And, she provided detailed testimony as to the many variables she claims she thoughtfully considered in arriving at her estimate for auxiliary assistance for that day. Both her belief in the correctness of her estimate and her detailed thought process is inconsistent with her claim that a lack of training was responsible for any overestimate on her part.

As one of the T-6s, the appellant was paid more and was expected to be able to handle more than the regular letter carriers. She had been performing that job for several years. In fact, Mr. Cox testified that she delivered the mail on CR4 faster than the regular carrier. Tr. at 138. And, it is undisputed that the carriers are held to being able to estimate their time to within 15 to 20 minutes. Despite her disciplinary action in August 1997 for unauthorized use of overtime, there is no evidence that she requested training specifically on how to complete a 3996 or otherwise asserted that she did not know how to perform that function. In fact, Mr. Cox testified that she never indicated that she lacked the skills to estimate properly or that she was otherwise not qualified to perform the duties of a T-6, Tr. at 109, 112-13.

Moreover, I found the appellant's explanations as to the matters she considered in arriving at her estimate lacked merit. As for her claim that she was unfamiliar with the route, she testified that she had carried CR4 for a total of about fifteen times and for three days immediately preceding September 13, 1997. Thus, she had, in my view, a reasonable amount of time in which to familiarize herself with the route. And, I note that

she did not raise this in her defense in response to the notice of proposed removal.

As it turned out, Mr. Cox's ability to estimate the amount of time required to deliver mail was very telling, in my view, particularly since he had not delivered, and was not responsible for delivering, the mail on CR4. Carrier Poppell assisted CR 4 for .18 (hundredths of an hour), Aldridge assisted for 1.42 (hundredths), and KC assisted for 1.25 (hundredths). *See* Exhibit E. *See* Tr. at 102-03. Thus, those three carriers delivered the mail Mr. Cox pulled off from the appellant in 2.85 (hundredths) hours, making his estimate for three hours of work short by only .15 hundredths of an hour.

I also find it difficult to believe that she considered that she would need time to "clean up" or process the mail that she brought back to the post office. She, herself, testified that, when working overtime, the carrier is not allowed to clean up that mail. That mail must be processed the next day. Tr. at 499.

As for the appellant's claim that she assumed that there wold be more DPS than there was on September 13, she assumed that she would have 1000 pieces of DPS mail to deliver, but she only had 871 pieces. Tr. at 559. She estimated that it would have taken her about 20 minutes longer if she had the additional 129 pieces of mail. *Id.* However, Mr. Cox testified, without rebuttal, that, in filling out the 3996, every carrier is supposed to look at the volume report for DPS mail that is posted on the wall. Tr. at 169-70. He also testified that it would take only a couple of minutes more to deliver 1000, as opposed to 871, pieces of DPS mail since the mail was already in order to be delivered. *Id.* at 170-71.

It is not clear to me how the fact that the appellant may have received additional mail to case and/or deliver after she turned in the 3996 was a favorable consideration to the appellant. Since she allegedly received it after she estimated the amount of auxiliary assistance she would need when she turned in the 3996, any such additional mail could not have been a relevant factor in the appellant's act of estimating. If anything, the appellant's receipt of any such additional mail would tend to show that she had overestimated her need for auxiliary assistance by even more than that with which she was charged.

The appellant's argument that her estimate was inflated, in part, because she considered that she would pull mail out of customers' boxes even though she was specifically told not to do so by Mr. Cox[3] is unpersuasive. Since Mr. Cox told her not to pull any such mail, the appellant should not have assigned any additional time for this task when calculating the need for assistance. And, by the appellant's own account, she would bring such mail back to the post office little by little so as not to have Mr. Cox detect that she continued to disobey his instructions. Tr. at 537-40. The appellant had been delivering that route for three days before September 13. She did not explain how, under the circumstances, that much mail would have accumulated in so many boxes on her route in four days such that it would add additional time for her to deliver the mail. Finally, Mr. Cox testified that he did not see any boxes

[3] I note that, in the notice of 14-day suspension dated August 7, 1997, Mr. Cox specifically informed the appellant that she "cleaned out cluster boxes which [he] told [her] was the responsibility of the regular carrier and not the T-6. . . ." *See* Appeal File, Tab 12, Exhibit 9, pp. 6-7.

that were stuffed with mail; he specifically recalled one box having five pieces of mail in it.

There is no evidence that the fact that the appellant had mail curtailed from the day before (K-Mart circulars and parcels) was a factor that helped to justify her overestimate of assistance required. The volume of previously-curtailed mail was taken into account by Mr. Cox in his estimate and assignment of assistance to the appellant. And, the mail was delivered by the appellant and the other carriers in far less time than the appellant estimated she would need.

In addition, the appellant argued that she had a very heavy volume of mail—20 linear feet of mail—to deliver. The records show that she had 17 feet of delivered volume (including 9.5 feet of cased mail), but she testified that she had approximately 20 feet of mail.[4] Tr. at 508.

In my view, it is not necessary to determine the exact amount of the mail that the appellant had to deliver that day. For, the fact of the matter is that Mr. Cox, considering the same amount of mail, was able to pull

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[4] On September 4, 1997, the appellant requested 4.25 hours of auxiliary assistance because of high volume following a holiday—22.25 feet of mail (without DPS mail). *See* Exhibit A-1. Mr. Cox testified that he approved 3 hours of overtime and that the appellant had a great deal of justification in making her estimate—a total of 30 feet of mail to deliver. Tr. at 141-43. And, he testified that he cannot say that the appellant overestimated her time on September 4 because he did not know if he curtailed some mail that day. *Id.* 141-44. In any event, the appellant testified that, in making her estimate of the need for assistance on September 13, she did not consider the amount of mail she had to deliver on September 4. *Id.* at 511.

off almost exactly 3 hours of mail to distribute to other carriers to deliver and have them accomplish the delivery of that mail. In addition, the appellant was able to deliver the remaining mail in far less time than her estimate.

The appellant's testimony was undisputed that the address labels on her case were changed on September 13. She testified that she considered that, as a result, it would take her more time to case the mail that day and she would, therefore, need that much more help to complete her route. However, the appellant did not explain how this consideration justified her estimate on that day. Again, even with the case labels being changed, delivery of the mail on CR4 was accomplished in far less time than the appellant estimated she would need.

I find it particularly revealing that the appellant did not list on the 3996 on September 13 her alleged impaired ability to walk or to case and carry the mail due to her foot surgery, carpal tunnel and bursitis. For, on September 8, 1997, she listed that one reason she needed auxiliary assistance that day was because her hand hurt. *See* Exhibit A-2. Thus, she clearly knew she could list her medical condition, if it impacted her ability to deliver her route, as a basis for justifying her need for auxiliary assistance. And, in her affidavit dated September 25, 1997, in response to the notice of proposed removal, the appellant stated that she was wearing her carpal tunnel brace, but she did not mention any difficulty regarding her foot. *See* Appeal File, Tab 1. I also note that Mr. Cox testified that he did not recall if she were [*sic*] wearing a brace on her arm on September 13. Tr. at 106.

The appellant had surgery on her right foot in May 1997 to remove a neuroma and she was then on sick leave for about 2.5 months. Tr. at 464. She returned to work on light duty in mid-July 1997, with a restriction of not walking more than 50 feet and carrying no more than 20 pounds. *Id.* at 465-66. She continued on light-duty status until the end of August 1997, receiving auxiliary assistance to deliver her routes.

However, she had been released to full duty beginning in September. And, I note that Mr. Cox testified that the appellant did not indicate she was in less than full health and did not act as if she were having any difficulties. Tr. at 107. Specifically, he testified that she was having no difficulty walking to and from the postal vehicle on September 13. Tr. at 118-19. And, he testified that there was not a great deal of walking on the appellant's route.

The humidity and reflection from hot weather during daylight hours are factors that might affect every carrier and the appellant presented no evidence that she, in particular, would be affected by such conditions. And, the appellant's testimony that it started to get dark at about 6:00 p.m. on September 13 is not credible. Actually, on September 13, 1997, the sun did not set until 7:34 p.m. in Savannah, Georgia. *See* The Old Farmer's Almanac, *www.almanac.com.* If the appellant had been granted the amount of overtime she requested, she would have concluded at 8:00, including her travel back to the post office and unloading the vehicle. Thus, even assuming that the sky becomes dark exactly at sunset, she would only have had a few minutes of mail left to deliver based upon her estimate.

As for the appellant's statement that auxiliary assistance does not have to service the route because they deliver the mail regardless of whether the postal customer has moved or has mail on hold, the appellant did not explain how much additional time it would have taken to deliver the route if the mail had been serviced for people moving or placing their mail on hold. In addition, there is no evidence that, on September 13, there was a great deal of mail on hold or to be forwarded. And, as noted below, I find that the appellant was allowed to pull the hold mail at her case—at least the mail that was triggered by memory recall. Thus, I find that the appellant did not show that this factor accounted in any significant way for the discrepancy between her estimate and the actual time it took to deliver the mail on September 13.

The appellant's testimony that she considered that she would be leaving the post office 45 minutes to one hour sooner than she did on September 13 is also of no moment. The reason, she testified, that she miscalculated her leaving time was because Mr. Cox prevented her from completing the withdrawal of her hold mail and told her to perform that function on the street. Tr. at 546-48. Mr. Cox testified that the appellant verified her hold mail and change of address at her case on that day. Tr. at 117.

I find that Mr. Cox's testimony was more credible than the appellant's. He clearly had no "ax to grind" with the appellant. In fact, the appellant testified that when he rode with her on September 13, they discussed various matters of a personal nature, such as family matters, hobbies, and his car. Tr. at 567-68. Thus, it appears that they had a rather pleasant, friendly conver-

sation, during which they joked and the appellant expressed concern for his safety. *Id.* at 568.

Mr. Cox's testimony was straightforward and not dissembling. He had a vivid recollection of the events of September 13, and I can discern no reason for him to fabricate his testimony in this regard. It also does not make sense that he would tell her not to pull the hold mail after he had made the decision to pull off some of her mail for other carriers to deliver. And, the appellant, at various times throughout the hearing, vacillated in her testimony and focused on minutia that could not have been responsible for her estimate. Accordingly, I find that Mr. Cox did not prevent the appellant from performing her duties regarding hold mail at the case on September 13.

Mr. Cox also acknowledged that she did stop her postal vehicle to retrieve a first-class letter in the middle of the road on the military base. Tr. at 135-37. He testified that he did not believe that it was her responsibility to police the base and that he considered this act, and the fact that she seemed to be rearranging packages in her vehicle, to be a waste of time. Tr. at 132, 136-37. He also acknowledged that she brought back to the post office some DPS mail that could not be delivered, but that he did not recall how much mail was involved. Tr. at 137. Again, because she requested auxiliary assistance, she would not have been authorized to work any mail with which she returned to the post office. And, I also note that the agency did not subtract any time she spent in relocating her mail in the vehicle with two seats.

In her response to the notice of proposed removal, the appellant argued that the total time she spent on

CR4 on September 13 was only .6 of an hour of additional time than she had requested. *See* Appeal File, Tab 1. The appellant's calculations are incorrect. She began her tour of duty at 8:00 a.m. and was supposed to end at 4:30 p.m. According to her estimate of a need for 3.5 additional hours, the time spent on her route should have concluded at 8:00 p.m. (a total of a 11.5 hour day, excluding a half-hour for lunch). By her own accounts, she returned to the post office at 3:22. Taking into account the 2.85 (hundredths) hours (or 2 hours and 51 minutes) spent by the three other carriers, delivery of mail on CR4 could have been completed at 6:13 p.m. (2 hours and 51 minutes after 3:22). Thus, it appears that the appellant overestimated the need for auxiliary assistance by approximately 1 hour and 45 minutes, which exceeds the 15-20 minute allowance by approximately 1.5 hours.

I find, therefore, that the agency proved that the appellant overestimated her need for auxiliary assistance on CR4 on September 13 by 1.5 hours beyond the permissible limits. Part of her duties include the requirement that she estimate the need for auxiliary assistance so that management can decide the best way to accomplish mail delivery by shifting workload or approving overtime. *See* Appeal File, Tab 7, Exhibit 3. Thus, I conclude that the agency proved that the appellant failed to perform her duties in a satisfactorily [*sic*] manner when she overestimated the need for auxiliary assistance on CR4 on September 13. The charge is, therefore, SUSTAINED.

2. The appellant's affirmative defenses

a. Disability discrimination

To establish a prima facie case of disability discrimination based on a failure to accommodate, the appellant must show: (a) that she is a disabled person under 29 C.F.R. § 1614.203(a) and that the action appealed to the Board was based upon her disability; and (b) that she is a qualified disabled person, that is, that she can perform the essential functions of her job with or without reasonable accommodation. *See Savage* v. *Department of the Navy*, 36 M.S.P.R. 148, 151-53 (1988). After the appellant has established a prima facie case, the burden shifts to the agency to demonstrate that reasonable accommodation would impose an undue hardship on its operations. Thereafter, the burden shifts back to the appellant to show that the agency's reasons are a pretext for discrimination.

The appellant contends that she suffers from various medical conditions relating to her foot, bursitis and carpel tunnel syndrome and that her conditions limit her ability to grip, lift and reach up with her right arm. *See* Appeal File, Tab 14. She argued that she could have done her job and estimated her time properly if she were not disabled, *i.e.*, if she had delivered CR4 herself, it would have taken her the amount of time she estimated.

Assuming that the appellant is a qualified disabled person, there is no evidence that her removal was based on her disability. As I found above, there is no evidence that the appellant's medical conditions negatively impaired her ability to deliver the mail on CR4 or that

she would have taken more time if she had delivered the route herself. On September 13, she was no longer on light duty following her foot surgery and she did not identify pain in her hand, arm or foot on the 3996 as a basis for needing additional auxiliary assistance. She was responsible for calculating the estimate at which she arrived and, according to her testimony, she considered many factors not relating to any alleged medical condition. Accordingly, I find that the appellant failed to present a prima facie case that her disability was related to the charge for which she was removed.

b. Race, sex, and age discrimination

The elements of a claim of discrimination on the ground of disparate treatment are: (a) the appellant is a member of a protected group; (b) she was similarly situated to an individual who was not a member of the protected group; and (c) she was treated more harshly or disparately than the individual who was not a member of her protected group.[5] *Buckler* v. *Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). Once the appellant has established a prima facie case, the burden shifts to the agency to articulate a legitimate nondiscriminatory reason for the agency's actions. Finally, once the agency has articulated a legitimate nondiscriminatory reason for its actions, the burden shifts to the appellant to show that the agency's proffered explanation constitutes a pretext for discrimination. To do so, the appellant must establish that the stated reason was false or not the real reason for

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[5] Because the appellant is alleging age discrimination, she must show that her age was the determinative factor in the action she is appealing. *See Borowski* v. *Department of Agriculture*, 40 M.S.P.R. 372, 374 (1989).

the action and that discrimination was the real reason. *Carter* v. *Small Business Administration*, 61 M.S.P.R. 656, 665 (1994).

It is undisputed that the appellant is Hispanic, female, and over 40 years old. The basis for the appellant's claim is that there were other carriers who were not disciplined for overestimating their workload. *See* Appeal File, Tab 14. Specifically, she identified Shannon Aldrich, James Poppell, Casey Chipple, Art Mathadiel, Tammie England, Eddie Johnson and John Weatherbee. *Id.*

During the prehearing conference, the appellant was advised that, for an employee to be a valid comparative employee in a disparate treatment claim, the appellant must prove that the employee engaged in substantially similar misconduct, including having a prior disciplinary record, and were disciplined more harshly. The appellant introduced no evidence whatsoever that any of these employees, except for possibly Eddie Johnson, had a prior disciplinary record. And, there was no evidence that any of those employees overestimated their need for auxiliary assistance. Therefore, I find that the appellant failed to prove her claim that comparative employees (who were not in her protected groups) were treated less harshly.

In addition, Tammie England and Shannon Aldridge are both female and Messrs. Chipple, Johnson and Weatherbee are over 40 years old. *See* Appeal File, Tab 14. Therefore, for these additional reasons, I find that the appellant failed to prove a prima facie case of discrimination based upon age and sex.

c. <u>Retaliation for filing EEO and OSHA complaints and for union activities</u>

To establish a prima facie case of retaliation for filing an EEO complaint, the appellant must show that: (a) she engaged in protected activity; (b) the accused official knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the retaliation and the adverse employment action. *See Cloonan* v. *United States Postal Service*, 65 M.S.P.R. 1, 4 (1994). To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Id.* at n.3. If the appellant meets this burden, the agency must show that it would have taken the action even absent the protected activity. *See Rockwell* v. *Department of Commerce*, 39 M.S.P.R. 217, 222 (1989).

The appellant contends that both Messrs. Cox and Tommy L. Caruthers, deciding official and Senior Labor Relations Specialist for the South Georgia District, Macon, Georgia, retaliated against her for her protected activities of filing-thirty-two EEO complaints concerning discrimination, one OSHA complaint in December 1997 concerning faculty equipment and failure to have a fire plan, and filing grievances on behalf of herself and others. *See* Appeal File, Tab 14.

Mr. Cox testified, without rebuttal, that he was not aware when he issued the notice of proposed removal that the appellant had filed a series of EEO complaints. Tr. at 118-19. He testified that he knew that she had called OSHA into the post office about some hard trays

that were defective, but he also testified, again without rebuttal, that her doing so played no part in his decision to propose her removal. He testified rather adamantly that she was doing what she should have done—report a safety hazard. Tr. at 120. He was also aware that she filed grievances because he discussed them with her at Step 1 in the grievance process.

Mr. Cox's testimony was straightforward and not dissembling. And, I note particularly that, even from the appellant's description of what occurred between her and Mr. Cox while she was delivering her route on September 13, 1997, their conversation was pleasant and personal. I detected no animus toward her in his testimony, other than the fact that he truly believed that she intentionally overestimated her need for auxiliary assistance on September 13, 1997. Accordingly, I find no nexus between retaliation and his decision to propose the appellant's removal.

As for Mr. Caruthers, he testified that he was not aware that the appellant had file an OSHA complaint independently of the instant litigation. Tr. at 235. There was no testimony establishing that he knew that she filed grievances on behalf of herself and others at the time he made his decision to effect her removal. He testified that the appellant may have mentioned during her oral reply that she filed EEO complaints. Tr. at 233. However, there is no evidence that Mr. Caruthers decided to remove the appellant because she filed EEO complaints. In fact, Mr. Caruthers, testified that he read the notice of proposed removal for the first time on the morning of the oral reply. Tr. at 240.

The appellant's evidence of retaliation at the hearing focused for the most part, not on Mr. Cox and Mr.

Caruthers, but primarily on William H. Davis, Postmaster of the Hinesville Post Office and Mr. Cox's supervisor. The undisputed testimony was that Mr. Cox did not discuss with Mr. Davis the fact that he was bringing the instant charge against the appellant. Tr. at 295. Mr. Cox simply sent him the paperwork and Mr. Davis signed the disciplinary request form, concurring in the issuance of the notice of proposed removal. *Id.* There was simply no evidence that Mr. Cox's issuance of the notice of proposed removal was tainted in any way by any influence on the part of Mr. Davis.

Similarly, there was no evidence that Mr. Davis attempted to influence Mr. Caruthers in his decision to effect the appellant's removal. As noted above, Mr. Caruthers testified that he was not familar with the case involving the appellant until the morning of the oral reply. And, he testified that he talked briefly with Mr. Davis after the oral reply and that he did not discuss the matter with him after that brief discussion. Tr. at 240-41 Mr. Caruthers was not asked at the hearing to identify the substance of his conversation with Mr. Davis. Accordingly, there is no evidence that Mr. Davis attempted to influence Mr. Caruthers' decision-making concerning the appellant's removal.

3. Nexus

It is axiomatic that there is a nexus between unsatisfactory performance and the efficiency of the service. *Cf.* 5 U.S.C. § 4302 (employees may be disciplined for performance-related matters). Thus, I find that there is a nexus between the sustained [*sic*] the charge and the efficiency of the service.

4. Reasonableness of the penalty

The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas* v. *Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). For the reasons below, I find that the agency conscientiously considered the *Douglas* factors and that the penalty of removal is within the bounds of reasonableness.

Mr. Caruthers testified that he considered the nature of the charge and the fact that there was no room for it to have been a mistake. Tr. at 230. He also considered the fact that the appellant's recent, prior disciplinary actions referenced similar offenses. *Id.*

The appellant's prior record consisted of: (1) a letter of reprimand on May 13, 1997, for insubordination for not following instructions to case her route before leaving work because her child was ill and she needed to obtain a doctor's appointment; (2) a 7-day suspension on June 7, 1997, for delaying mail and failure to follow instructions; and, (3) a 14-day suspension on August 18, 1997, for delaying accountable mail, unauthorized overtime/failure to follow instructions, and failure to perform her duties in a satisfactory manner/unauthorized overtime.[6] *See* Appeal File, Tab 13.

Because those prior disciplinary actions were in writing, made a matter of record, and the appellant had

[6] The first two disciplinary actions were issued as a 7-day and a 14-day suspension, but were subsequently reduced to a letter of reprimand and a 7-day suspension.

the opportunity to grieve them, the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous. *Bolling* v. *Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). Despite having been notified that she could present argument concerning whether the prior actions were clearly erroneous in her closing brief, the appellant's closing brief did not set forth any such arguments. *See* Appeal File, Tabs 14 and 21. I have, nonetheless, reviewed the record of the prior disciplinary actions and I do not find that I am left with a "firm and definite conviction that a mistake has been committed." *Bolling*, 9 M.S.P.R. at 340. Accordingly, I find that the agency properly considered the appellant's prior disciplinary actions.

Mr. Caruthers testified that the appellant did not present any mitigating factors to him during the oral reply. Tr. at 231. Although she mentioned her medical conditions, she did not prove that her removal was taken because of any of those conditions or that they had any impact on the sustained charge. And, while she testified that she was under stress in the post office in September 1997, she produced no evidence to substantiate any such stress or show how stress caused her to overestimate her time. Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the appellant. *Kissner* v. *Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986).

At first blush, a removal for one instance of failure to perform duties satisfactorily may appear unreasonable. However, considering the appellant's prior disciplinary actions also involved unauthorized overtime, that one

instance takes on additional significance and tends to reveal a pattern of conduct by the appellant to disregard the agency's and her supervisor's expectations of her performance and conduct.

Although the appellant claims that she did not know how to estimate the amount of assistance/overtime she would need, she argued at the hearing that she accurately estimated her time and, indeed, may even have shorted herself. I found the appellant's testimony to be disingenuous. Because Mr. Cox could estimate the amount of time to deliver mail so well and he never even delivered CR4, because it was undisputed that carriers are expected to, and that 99% of the carriers[7] can, estimate the amount of time it will take them to deliver mail, and because the appellant's explanations for how she accounted for her estimate were not credible, I find that the appellant's overestimate was intentional and that she did it to either earn overtime for herself or to avoid delivering some of her mail. *See Hamilton* v. *U.S. Postal Service*, 71 M.S.P.R. 547, 555-56 (1996) (if an agency proves that the employee's misconduct was intentional rather than merely negligent, the agency is free to use that fact as an aggravating factor in the penalty selection).

The appellant occupied a leadership position amongst carriers and was expected to be able to carry out her job. The agency expects carriers and T-6s to properly complete a 3996 so that they can reassign work, as necessary, to accomplish its mission—to deliver the mail as promptly as possible. The agency has to be able

[7] *See* Tr. at 118-19.

to rely upon the honest assessments of their carriers/T-6s to accomplish that mission.

I have considered the testimony of Sheila J. Bolden, who has been the Postmaster in Lafayette, Georgia, since 1991. Prior to 1991, Ms. Bolden supervised the appellant and she testified that the appellant was one of the best employees she ever had. Tr. at 388. She also testified that she would hire her to work in her post office. *Id.* There was no evidence, however, that Ms. Bolden worked with the appellant recently or was otherwise aware of the appellant's past disciplinary record. Accordingly, I find that the testimony of her current supervisor, Mr. Cox, is entitled to greater weight than that of Ms. Bolden.

In my view, that the appellant refuses to accept the instructions she was given by her present supervisors was evident from her own testimony. She testified that Mr. Cox specifically told her not to empty cluster boxes if they were full. Tr. at 534-40. In fact, in the notice of 14-day suspension dated August 7, 1997, Mr. Cox wrote: "After you returned to the office, it was found that you had taken out hold mail again and mail that you had cleaned out of customers boxes which as previously explained was the regular carrier's duty." *See* Appeal File, Tab 13. Nevertheless, she testified that she continues to pull this mail and even disguises the fact that she is doing so in order to avoid detection by Mr. Cox. Tr. at 538-40. I find that this testimony reveals the appellant has little potential for rehabilition.

Based upon these findings and despite the appellant's 12 years of federal service, I find that the agency properly considered the relevant factors and arrived at a penalty that is within the bounds of reasonableness.

Accordingly, I find that the appellant's removal promotes the efficiency of the service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ LYNN P. YOVINO
LYNN P. YOVINO
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on Oct. 16 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date that initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). You may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with :

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARIA A. GREGORY, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

[Filed: July 13, 2000]

ORDER

Before: MAYER, Chief Judge, CLEVENGER, Circuit Judge, and GAJARSA, Circuit Judge.

A petition for rehearing having been filed by the RESPONDENT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED;

The mandate of the court will issue on July 20, 2000.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: July 13, 2000

APPENDIX E

STATUTORY PROVISIONS

1. Section 7511(a) of Title 5 of the United States Code states as follows:

§ 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment

pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

2. Section 7512 of Title 5 of the United States Code states as follows:

§ 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

3. Section 7513 of Title 5 of the United States Code states as follows:

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence

of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

4. Section 7701 of Title 5 of the United States Code states as follows:

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority

to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant

is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board

fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

5. Section 7703 of Title 5 of the United States Code (1994 & Supp. IV 1998) states as follows:

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed

under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board,

the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.